

109TH CONGRESS  
1ST SESSION

# S. 2141

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## AN ACT

To make improvements to the Federal Deposit Insurance  
Act.

1       *Be it enacted by the Senate and House of Representa-*  
2   *tives of the United States of America in Congress assembled,*

1 **SECTION. 1. TREATMENT OF CERTAIN AGREEMENTS BY**  
 2 **CONSERVATORS OR RECEIVERS OF DEPOSI-**  
 3 **TORY INSTITUTIONS.**

4 (a) DEFINITION OF SECURITIES CONTRACT.—

5 (1) FDIC-INSURED DEPOSITORY INSTITU-  
 6 TIONS.—Section 11(e)(8)(D)(ii) of the Federal De-  
 7 posit Insurance Act (12 U.S.C. 1821(e)(8)(D)(ii)) is  
 8 amended—

9 (A) in subclause (I)—

10 (i) by striking “mortgage loan, or”  
 11 and inserting “mortgage loan,”; and

12 (ii) by inserting before the semicolon  
 13 “(whether or not such repurchase or re-  
 14 verse repurchase transaction is a ‘repur-  
 15 chase agreement’, as defined in clause  
 16 (v))”;

17 (B) in subclause (IV)—

18 (i) by inserting “(including by nova-  
 19 tion)” after “the guarantee”; and

20 (ii) by inserting before the semicolon  
 21 “(whether or not such settlement is in con-  
 22 nection with any agreement or transaction  
 23 referred to in subclauses (I) through (XII)  
 24 (other than subclause (II)))”;

(C) in subclause (IX), by striking “or (VIII)” each place that term appears and inserting “(VIII), (IX), or (X)”;

(D) by redesignating subclauses (VI) through (X) as subclauses (VIII) through (XII), respectively; and

(E) by inserting after subclause (V) the following:

“(VI) means any extension of credit for the clearance or settlement of securities transactions;

“(VII) means any loan transaction coupled with a securities collar transaction, any prepaid securities forward transaction, or any total return swap transaction coupled with a securities sale transaction;”.

(2) INSURED CREDIT UNIONS.—Section 207(c)(8)(D)(ii) of the Federal Credit Union Act (12 U.S.C. 1787(c)(8)(D)(ii)) is amended—

(A) in subclause (I)—

(i) by striking “mortgage loan, or” and inserting “mortgage loan,”; and

(ii) by inserting before the semicolon “(whether or not such repurchase or re-

verse repurchase transaction is a ‘repurchase agreement’, as defined in clause (v))”;

(B) in subclause (IV)—

(i) by inserting “(including by novation)” after “the guarantee”; and

(ii) by inserting before the semicolon “(whether or not such settlement is in connection with any agreement or transaction referred to in subclauses (I) through (XII) (other than subclause (II)))”;

(C) in subclause (IX), by striking “or (VIII)” each place that term appears and inserting “(VIII), (IX), or (X)”;

(D) by redesignating subclauses (VI) through (X) as subclauses (VIII) through (XII), respectively; and

(E) by inserting after subclause (V) the following:

“(VI) means any extension of credit for the clearance or settlement of securities transactions;

“(VII) means any loan transaction coupled with a securities collar transaction, any prepaid securities

1 forward transaction, or any total re-  
 2 turn swap transaction coupled with a  
 3 securities sale transaction;”.

4 (b) DEFINITION OF FORWARD CONTRACT.—Section  
 5 11(e)(8)(D)(iv)(I) of the Federal Deposit Insurance Act  
 6 (12 U.S.C. 1821(e)(8)(D)(iv)(I)) is amended by striking  
 7 “transaction, reverse repurchase transaction” and insert-  
 8 ing “or reverse repurchase transaction (whether or not  
 9 such repurchase or reverse repurchase transaction is a ‘re-  
 10 purchase agreement’, as defined in clause (v))”.

11 (c) DEFINITION OF SWAP AGREEMENT.—

12 (1) FDIC-INSURED DEPOSITORY INSTITU-  
 13 TIONS.—Section 11(e)(8)(D)(vi) of the Federal De-  
 14 posit Insurance Act (12 U.S.C. 1821(e)(8)(D)(vi)) is  
 15 amended—

16 (A) in subclause (I)—

17 (i) by striking “or precious metals”  
 18 and inserting “, precious metals, or other  
 19 commodity”; and

20 (ii) by striking “or a weather swap,  
 21 weather derivative, or weather option” and  
 22 inserting “weather swap, option, future, or  
 23 forward agreement; an emissions swap, op-  
 24 tion, future, or forward agreement; or an

inflation swap, option, future, or forward agreement”;

(B) in subclause (II)—

(i) by inserting “or other derivatives” after “dealings in the swap”; and

(ii) by striking “future, or option” and inserting “future, option, or spot transaction”; and

(C) by striking “the Securities Act of 1933, the Securities Exchange Act of 1934, the Public Utility Holding Company Act of 1935, the Trust Indenture Act of 1939, the Investment Company Act of 1940, the Investment Advisers Act of 1940, the Securities Investor Protection Act of 1970, the Commodity Exchange Act, the Gramm-Leach-Bliley Act, and the Legal Certainty for Bank Products Act of 2000” and inserting “the Gramm-Leach-Bliley Act, the Legal Certainty for Bank Products Act of 2000, the securities laws (as that term is defined in section 3(a)(47) of the Securities Exchange Act of 1934) and the Commodity Exchange Act”.

(2) INSURED CREDIT UNIONS.—Section 207(c)(8)(D)(vi) of the Federal Credit Union Act (12 U.S.C. 1787(c)(8)(D)(vi)) is amended—

(A) in subclause (I)—

(i) by striking “or precious metals” and inserting “, precious metals, or other commodity”; and

(ii) by striking “or a weather swap, weather derivative, or weather option” and inserting “weather swap, option, future, or forward agreement; an emissions swap, option, future, or forward agreement; or an inflation swap, option, future, or forward agreement”;

(B) in subclause (II)—

(i) by inserting “or other derivatives” after “dealings in the swap”; and

(ii) by striking “future, or option” and inserting “future, option, or spot transaction”; and

(C) by striking “the Securities Act of 1933, the Securities Exchange Act of 1934, the Public Utility Holding Company Act of 1935, the Trust Indenture Act of 1939, the Investment Company Act of 1940, the Investment

1           Advisers Act of 1940, the Securities Investor  
 2           Protection Act of 1970, the Commodity Ex-  
 3           change Act, the Gramm-Leach-Bliley Act, and  
 4           the Legal Certainty for Bank Products Act of  
 5           2000” and inserting “the Gramm-Leach-Bliley  
 6           Act, the Legal Certainty for Bank Products Act  
 7           of 2000, the securities laws (as that term is de-  
 8           fined in section 3(a)(47) of the Securities Ex-  
 9           change Act of 1934) and the Commodity Ex-  
 10          change Act”.

11 **SEC. 2. CLARIFYING AMENDMENTS RELATING TO DEFINI-**  
 12 **TION OF PERSON.**

13           (a) FDIC-INSURED DEPOSITORY INSTITUTIONS  
 14 DEFINITION OF PERSON.—Section 11(e)(8)(D) of the  
 15 Federal Deposit Insurance Act (12 U.S.C. 1821(e)(8)(D))  
 16 is amended by adding at the end the following:

17                   “(ix) PERSON.—The term ‘person’ includes  
 18                   any governmental entity and any entity in-  
 19                   cluded in the definition of the term ‘person’ in  
 20                   section 1 of title 1, United States Code.”.

21           (b) INSURED CREDIT UNIONS DEFINITION OF PER-  
 22 SON.—Section 207(c)(8)(D) of the Federal Credit Union  
 23 Act (12 U.S.C. 1787(c)(8)(D)) is amended by adding at  
 24 the end the following:



1                   “(vii) PERSON.—The term ‘person’ in-  
 2                   cludes any governmental entity and any  
 3                   entity included in the definition of the  
 4                   term ‘person’ in section 1 of title 1, United  
 5                   States Code.”.

6 **SEC. 3. FEDERAL DEPOSIT INSURANCE CORPORATION IM-**  
 7 **PROVEMENT ACT OF 1991.**

8           (a) ENFORCEABILITY OF BILATERAL NETTING CON-  
 9 TRACTS.—Section 403 of the Federal Deposit Insurance  
 10 Corporation Improvement Act of 1991 (12 U.S.C. 4403)  
 11 is amended—

12           (1) in each of subsections (a) and (f), by strik-  
 13 ing “paragraphs (8)(E), (8)(F), and (10)(B) of”  
 14 each place that term appears; and

15           (2) in subsection (a), by inserting “terminated,  
 16 liquidated, accelerated, and” after “institutions shall  
 17 be”.

18           (b) ENFORCEABILITY OF CLEARING ORGANIZATION  
 19 NETTING CONTRACTS.—Section 404 of the Federal De-  
 20 posit Insurance Corporation Improvement Act of 1991 (12  
 21 U.S.C. 4404) is amended—

22           (1) in each of subsections (a) and (h), by strik-  
 23 ing “paragraphs (8)(E), (8)(F), and (10)(B) of”  
 24 each place that term appears; and

1           (2) in subsection (a), by inserting “terminated,  
2       liquidated, accelerated, and” after “organization  
3       shall be”.

4 **SEC. 4. CONFORMING AMENDMENTS.**

5       (a) CLARIFYING DEFINITIONS.—Title 11, United  
6 States Code, is amended—

7           (1) in section 101—

8               (A) in paragraph (22)(A)—

9                   (i) by striking “(domestic or foreign)”  
10                  after “an entity”; and

11                  (ii) by inserting “(whether or not a  
12                  ‘customer’, as defined in section 741)”  
13                  after “custodian for a customer”;

14               (B) in paragraph (22A)—

15                   (i) by striking “on any day during the  
16                  previous 15-month period” each place it  
17                  appears and inserting “at such time or on  
18                  any day during the 15-month period pre-  
19                  ceding the date of the filing of the peti-  
20                  tion”; and

21                   (ii) by inserting “(aggregated across  
22                  counterparties)” after “principal amount  
23                  outstanding”;

24               (C) in paragraph (25)(A)—

1 (i) by inserting “, as defined in sec-  
 2 tion 761” after “commodity contract”; and

3 (ii) by striking “repurchase trans-  
 4 action, reverse repurchase transaction,”  
 5 and inserting “repurchase or reverse re-  
 6 purchase transaction (whether or not such  
 7 repurchase or reverse repurchase trans-  
 8 action is a ‘repurchase agreement’, as de-  
 9 fined in this section)”;  
 10

(D) in paragraph (53B)(A)—

11 (i) in clause (i)—

12 (I) in subclause (II), by striking  
 13 “or precious metals” and inserting “,  
 14 precious metals, or other commodity  
 15 agreement”;

16 (II) in subclause (VII), by strik-  
 17 ing “or” at the end;

18 (III) in subclause (VIII), by  
 19 striking “weather derivative, or weath-  
 20 er option” and inserting “option, fu-  
 21 ture, or forward agreement”; and

22 (IV) by adding at the end the fol-  
 23 lowing:

24 “(IX) an emissions swap, option,  
 25 future, or forward agreement; or

1                   “(X) an inflation swap, option,  
 2                   future, or forward agreement;” and  
 3                   (ii) in clause (ii)—  
 4                   (I) in subclause (I), by inserting  
 5                   “or other derivatives” after “dealings  
 6                   in the swap”; and  
 7                   (II) in subclause (II), by striking  
 8                   “future, or option” and inserting “fu-  
 9                   ture, option, or spot transaction”; and  
 10                  (E) in paragraph (53B)(B), by striking  
 11                  “the Securities Act of 1933, the Securities Ex-  
 12                  change Act of 1934, the Public Utility Holding  
 13                  Company Act of 1935, the Trust Indenture Act  
 14                  of 1939, the Investment Company Act of 1940,  
 15                  the Investment Advisers Act of 1940, the Secu-  
 16                  rities Investor Protection Act of 1970, the Com-  
 17                  modity Exchange Act, the Gramm-Leach-Bliley  
 18                  Act, and the Legal Certainty for Bank Products  
 19                  Act of 2000” and inserting “the Gramm-Leach-  
 20                  Bliley Act, the Legal Certainty for Bank Prod-  
 21                  ucts Act of 2000, the securities laws (as that  
 22                  term is defined in section 3(a)(47) of the Secu-  
 23                  rities Exchange Act of 1934) and the Com-  
 24                  modity Exchange Act”;  
 25                  (2) in section 362(b)—

1 (A) by striking paragraphs (6) and (7) and  
 2 inserting the following:

3 “(6) under subsection (a) of this section, of the  
 4 exercise by a commodity broker, forward contract  
 5 merchant, stockbroker, financial institution, finan-  
 6 cial participant, or securities clearing agency of any  
 7 contractual right (as defined in section 555 or 556)  
 8 under any security agreement or arrangement or  
 9 other credit enhancement forming a part of or re-  
 10 lated to any commodity contract, forward contract  
 11 or securities contract, or of any contractual right (as  
 12 defined in section 555 or 556) to offset or net out  
 13 any termination value, payment amount, or other  
 14 transfer obligation arising under or in connection  
 15 with 1 or more such contracts, including any master  
 16 agreement for such contracts;

17 “(7) under subsection (a) of this section, of the  
 18 exercise by a repo participant or financial partici-  
 19 pant of any contractual right (as defined in section  
 20 559) under any security agreement or arrangement  
 21 or other credit enhancement forming a part of or re-  
 22 lated to any repurchase agreement, or of any con-  
 23 tractual right (as defined in section 559) to offset or  
 24 net out any termination value, payment amount, or  
 25 other transfer obligation arising under or in connec-

1       tion with 1 or more such agreements, including any  
 2       master agreement for such agreements;”;

3               (B) by striking paragraph (17) and insert-  
 4       ing the following:

5       “(17) under subsection (a) of this section, of  
 6       the exercise by a swap participant or financial par-  
 7       ticipant of any contractual right (as defined in sec-  
 8       tion 560) under any security agreement or arrange-  
 9       ment or other credit enhancement forming a part of  
 10      or related to any swap agreement, or of any contrac-  
 11      tual right (as defined in section 560) to offset or net  
 12      out any termination value, payment amount, or  
 13      other transfer obligation arising under or in connec-  
 14      tion with 1 or more such agreements, including any  
 15      master agreement for such agreements;”;

16              (C) by striking paragraph (27) and insert-  
 17      ing the following:

18      “(27) under subsection (a) of this section, of  
 19      the exercise by a master netting agreement partici-  
 20      pant of any contractual right (as defined in section  
 21      555, 556, 559, or 560) under any security agree-  
 22      ment or arrangement or other credit enhancement  
 23      forming a part of or related to any master netting  
 24      agreement, or of any contractual right (as defined in  
 25      section 555, 556, 559, or 560) to offset or net out

1 any termination value, payment amount, or other  
 2 transfer obligation arising under or in connection  
 3 with 1 or more such master netting agreements to  
 4 the extent that such participant is eligible to exercise  
 5 such rights under paragraph (6), (7), or (17) for  
 6 each individual contract covered by the master net-  
 7 ting agreement in issue; and”;

8 (3) in section 741(7)(A)—

9 (A) in clause (i)—

10 (i) by striking “mortgage loan or”  
 11 and inserting “mortgage loan,”; and

12 (ii) by inserting before the semicolon  
 13 “(whether or not such repurchase or re-  
 14 verse repurchase transaction is a ‘repur-  
 15 chase agreement’, as defined in section  
 16 101)”;

17 (B) in clause (iii)—

18 (i) by inserting “(including by nova-  
 19 tion)” after “the guarantee”; and

20 (ii) by inserting before the semicolon  
 21 “(whether or not such settlement is in con-  
 22 nection with any agreement or transaction  
 23 referred to in clauses (i) through (xi))”;

1 (C) in clause (viii), by striking “or (vii)”  
 2 each place it appears and inserting “(vii), (viii),  
 3 or (ix)”;

4 (D) by redesignating clauses (v) through  
 5 (ix) as clauses (vii) through (xi), respectively;  
 6 and

7 (E) by inserting after clause (iv) the fol-  
 8 lowing:

9 “(v) any extension of credit for  
 10 the clearance or settlement of securi-  
 11 ties transactions;

12 “(vi) any loan transaction cou-  
 13 pled with a securities collar trans-  
 14 action, any prepaid forward securities  
 15 transaction, or any total return swap  
 16 transaction coupled with a securities  
 17 sale transaction;”.

18 (b) LIMITATION OF AVOIDANCE POWERS UNDER  
 19 MASTER NETTING AGREEMENT.—Section 546 of title 11,  
 20 United States Code, is amended—

21 (1) in subsection (e)—

22 (A) by inserting “(or for the benefit of)”  
 23 before “a commodity broker”; and

24 (B) by inserting “or that is a transfer  
 25 made by or to (or for the benefit of) a com-



modity broker, forward contract merchant,  
 stockbroker, financial institution, financial par-  
 ticipant, or securities clearing agency, in con-  
 nection with a securities contract, as defined in  
 section 741(7), commodity contract, as defined  
 in section 761(4), or forward contract,” after  
 “securities clearing agency,”;

(2) in subsection (f)—

(A) by striking “that is a margin payment,  
 as defined in section 741 or 761 of this title,  
 or settlement payment, as defined in section  
 741 of this title,”; and

(B) by inserting “(or for the benefit of)”  
 before “a repo participant”;

(3) in subsection (g), by inserting “(or for the  
 benefit of)” before “a swap participant”; and

(4) in subsection (j), by inserting “(or for the  
 benefit of)” after “made by or to”.

(c) SIPC STAY.—Section 5(b)(2)(C)(iii) of the Secu-  
 rities Investor Protection Act of 1970 (15 U.S.C.  
 78eee(b)(2)(C)(iii)) is amended—

(1) by inserting “a derivatives clearing organi-  
 zation (as defined in the Commodity Exchange Act),  
 a multilateral clearing organization (as defined in

1 the Federal Deposit Insurance Corporation Improve-  
 2 ment Act of 1991),” after “rule or bylaw of”; and  
 3 (2) by striking “or a securities clearance agen-  
 4 cy, a right set forth in a bylaw of a clearing organi-  
 5 zation or contract market” and inserting “a securi-  
 6 ties clearing agency, a contract market designated  
 7 under the Commodity Exchange Act, a derivatives  
 8 transaction execution facility registered under the  
 9 Commodity Exchange Act, or a board of trade (as  
 10 defined in the Commodity Exchange Act),”.

11 (d) SAVINGS CLAUSE.—Title IX of the Bankruptcy  
 12 Abuse Prevention and Consumer Protection Act of 2005  
 13 (Public Law 109–8, 119 Stat. 146) is amended by adding  
 14 at the end the following:

15 **“SEC. 912. SAVINGS CLAUSE.**

16 “The meanings of terms used in this title are applica-  
 17 ble for the purposes of this title only, and shall not be  
 18 construed or applied so as to challenge or affect the char-  
 19 acterization, definition, or treatment of any similar terms  
 20 under any other statute, regulation, or rule, including the  
 21 Gramm-Leach-Bliley Act, the Legal Certainty for Bank  
 22 Products Act of 2000, the securities laws (as that term  
 23 is defined in section 3(a)(47) of the Securities Exchange  
 24 Act of 1934), and the Commodity Exchange Act.”.

1 **SEC. 5. WALKAWAY CLAUSES.**

2 Section 11(e)(8)(G)) of the Federal Deposit Insur-  
 3 ance Act (12 U.S.C. 1821(e)(8)(G)) is amended to read  
 4 as follows:

5 “(G) WALKAWAY CLAUSES NOT EFFEC-  
 6 TIVE.—

7 “(i) IN GENERAL.—Notwithstanding  
 8 the provisions of subparagraphs (A) and  
 9 (E), and sections 403 and 404 of the Fed-  
 10 eral Deposit Insurance Corporation Im-  
 11 provement Act of 1991, no walkaway  
 12 clause shall be enforceable in a qualified fi-  
 13 nancial contract of an insured depository  
 14 institution in default, provided that any  
 15 payment or delivery obligations otherwise  
 16 due from a party pursuant to the qualified  
 17 financial contract shall be suspended from  
 18 the time that the receiver is appointed  
 19 until the earlier of—

20 “(I) the time that such party re-  
 21 ceives notice that such contract has  
 22 been transferred pursuant to subpara-  
 23 graph (A); or

24 “(II) 5:00 p.m. (eastern time) on  
 25 the business day following the date of  
 26 the appointment of the receiver.

1 “(ii) WALKAWAY CLAUSE DEFINED.—

2 For purposes of this subparagraph, the  
 3 term ‘walkaway clause’ means any provi-  
 4 sion in a qualified financial contract that  
 5 suspends, conditions, or extinguishes a  
 6 payment obligation of a party in whole or  
 7 in part or does not create a payment obli-  
 8 gation of a party that would otherwise  
 9 exist solely because of such party’s status  
 10 as a nondefaulting party in connection  
 11 with the insured depository institution’s in-  
 12 solvency or the appointment of or the exer-  
 13 cise of rights or powers by a conservator or  
 14 receiver, and not as a result of a party’s  
 15 exercise of any right to offset, setoff, or  
 16 net obligations that exist under the con-  
 17 tract, any other contract between those  
 18 parties, or applicable law.”.

19 **SEC. 6. EFFECTIVE DATE.**

20 (a) EFFECTIVE DATE.—This Act and the amend-  
 21 ments made by this Act shall take effect on the date of  
 22 enactment of this Act.

23 (b) NO RETROACTIVE APPLICATION OF AMEND-  
 24 MENTS.—The amendments made by this Act shall not  
 25 apply to any cases commenced under title 11, United

- 1 States Code, or appointments made under any Federal or
- 2 State law, before the effective date of this Act.

Passed the Senate December 17, 2005.

Attest:

*Secretary.*

109TH CONGRESS  
1ST SESSION

**S. 2141**

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**AN ACT**

To make improvements to the Federal Deposit  
Insurance Act.